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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1950

No. 739

TRANSCONTINENTAL & WESTERN AIR, INC.,
Petitioner,

v.

CARLA PEKELIS, individually and as Administratrix of the goods, credits and chattels which were of Alexander H. Pekelis, deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

WILLIAM J. JUNKERMAN,
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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Transcontinental & Western Air, Inc., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on February 15, 1951.

Opinion Below.

After a trial before Honorable JOHN F. X. MCGOHEY and a jury in the United States District Court for the Southern District of New York judgment was entered for

the respondent herein upon the jury's verdict, in the amount of $8,300 on March 7, 1950 (R. 41). The opinion of the Court of Appeals for the Second Circuit (R. 632-650) reversing the aforesaid judgment and ordering a new trial is reported in 187 F. 2d 122.

Jurisdiction.

The judgment of the Circuit Court of Appeals is dated February 15, 1951 (R. 651). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented.

Whether accident reports containing facts, conclusions and opinions concerning the cause of an airplane accident, prepared by employees of an airline and submitted to other employees of the same airline, are admissible as evidence against the airline either as admissions of the corporation or as records made in the regular course of business under the Federal business entry statute, 62 Stat. 945, 28 U. S. C. § 1732.

Statute Involved.

The pertinent statutory provision is printed in Appendix A, *infra*, page 15.

Statement.

Respondent (plaintiff below) brought this action in the United States District Court for the Southern District of New York to recover damages for the alleged wrongful death of her husband, Alexander H. Pekelis, who was killed in an accident which occurred at Shannon Airport, Eire on December 28, 1946 involving one of your petitioner's Lockheed Constellation airplanes. The answer (R. 7-11) pleaded as an affirmative defense the terms of the International

Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on October 12, 1929 (otherwise known as the Warsaw Convention). Under the terms of this Convention (49 Stat. Pt. 2 at pp. 3018-3020) the liability of the carrier in respect to each passenger carried is limited to the sum of 125,000 French francs at a specified rate of exchange ($8,300 in United States currency). If, however, the plaintiff shall prove that the damage was caused by "wilful misconduct on the part of the carrier" this limitation does not apply. In this case plaintiff below attempted to prove such wilful misconduct. The only issue submitted to the jury (R. 480) was whether or not such wilful misconduct had been proved. The jury's verdict (R. 626) was for the plaintiff in the sum of $8,300; in other words, a verdict that wilful misconduct had not been proved.

During the course of the trial plaintiff offered in evidence certain documents which are fully described in the opinion of the court below. These documents were: (1) A letter from the defendant's acting general manager to "All International Division Personnel Concerned" which prescribed the procedure to be followed in the event of an accident involving TWA International Aircraft (plaintiff's exhibit 10 for identification, R. 535-568); (2) The report of the "Regional Accident Investigation Board" of the defendant (plaintiff's exhibit 11 for identification, R. 569-610); (3) Part of the report of defendant's "maintenance investigation" (plaintiff's exhibit 13 for identification, R. 611-613); (4) The report of the defendant's "International Division Accident Investigation Board" (plaintiff's exhibit 12 for identification, R. 496-534); (5) A letter purportedly written by one of defendant's captains, Fred G. Sigman, regarding instrument malfunctioning in an airplane flown by Captain Sigman on January 9, 1947 (R. 390, 391). On

defendant's objections all of these documents were excluded by the District Court.

Plaintiff below appealed from the judgment entered on the jury's verdict to the Court of Appeals for the Second Circuit, arguing that all of these documents should have been admitted. The Court of Appeals reversed the judgment of the District Court and ordered a new trial (R. 650) in this action upon the grounds that the documents mentioned under (1) through (4) *supra,* should have been admitted. The Court also held that the plaintiff should have been permitted to show the admissibility of the Sigman letter and that "The Court should not have excluded it merely on the ground of irrelevancy." The court below, however, did not decide whether or not the exclusion of the Sigman letter was sufficient grounds for reversal if taken alone (R. 638).

In its opinion the Second Circuit Court held that all of the accident reports offered by plaintiff should have been admitted either as admissions of the defendant corporation (R. 646) or under the Federal business entry statute, 28 U. S. C. § 1732 (set out in Appendix A, *infra*) (R. 649).

In excluding these documents the District Court wrote no opinion. However, in a previous trial brought by the executor of one of the other passengers killed in the accident, District Judge CLANCY handed down an opinion (not officially reported) on January 16, 1950, excluding all of the papers which the Second Circuit has now ruled were admissible (*Weil* v. *T. W. A.*, U. S. D. C., S. D. N. Y. 1950, Civ. No. 43-307). For the convenience of this Court and for the relevance of that opinion to this petition it is reprinted in full as Appendix B.

Specifications of Errors to Be Urged.

The Circuit Court erred:

1. In holding that the accident reports in the case at bar were regular business entries within the terms of the Federal business entry statute, 28 U. S. C. § 1732.

2. In holding that these reports constituted records "of any act, transaction, occurrence, or event" within the meaning of the statute despite the fact that they contained opinions and conclusions of the writers.

3. In holding that the accident reports were admissible as admissions of the corporation despite the fact that they were reports made by subordinate employees of the corporation and were not shown to have been adopted by the corporation.

4. In holding that the reports were admissible against the corporation despite the fact that they contained opinions and conclusions of the makers.

5. In holding that the Sigman letter was not irrelevant.

Reasons for Granting the Writ.

1. The decision of the court below in the instant case is based in part upon an interpretation of the Federal business entry statute (62 Stat. 945, 28 U. S. C. § 1732) which is believed to be in conflict with the decision of this Court in *Palmer* v. *Hoffman,* 318 U. S. 109. Moreover, the opinion of the court below, in its interpretation of the opinion of this Court in *Palmer* v. *Hoffman,* is in conflict with the decision of the Circuit Court of Appeals for the District of Columbia in the case of *New York Life Ins. Co.* v. *Taylor,* 147 F. 2d 297, a case which involved the admission of hospital records containing "complicated medical and psychiatric diagnoses".

In arriving at its decision, the court below frankly stated that it was relying upon its own opinion in the *Palmer* case, and assumed that the rationale of its opinion had been adopted by this Court. Nothing in this Court's opinion in *Palmer* v. *Hoffman* justifies such assumption. As a matter of fact, it is noteworthy that this Court, with the opinion of the Second Circuit Court before it for review, emphasized an entirely different ground for its own opinion.

The opinion below in the present case states:

> "The Circuit Court of Appeals had excluded the evidence on the ground that, as stated by the majority of that Court, it was 'dripping with motivations to misrepresent', Hoffman v. Palmer, 2 Cir., 129 F. 2d 976, 991. It was this consideration, we believe, that led the Supreme Court to say that the reports in Palmer v. Hoffman, supra, were not business entries within the meaning of the statute for the reason that: 'Their primary utility is in litigating, not in railroading'." (R. 647).

Accordingly, the court below gave scant attention to the question of whether the excluded reports came within the literal terms of the statute as a "memorandum or record of any act, transaction, occurrence, or event * * * made in the regular course of any business", saying of this point only that:

> "The reports in the case at bar were 'regular' within the meaning of the statute, because they were required not merely in investigating the accident at the Shannon Airport but all future accidents." (R. 647).

It is respectfully submitted that this holding by the court below is squarely opposed to this Court's opinion in *Palmer* v. *Hoffman,* which stated specifically that such a

report was *not* to be considered within the terms of the statute (318 U. S. 109 at pp. 111, 112):

> "But we do not think that it was made 'in the regular course' of business within the meaning of the Act. The business of the petitioners is the railroad business. That business like other enterprises entails the keeping of numerous books and records essential to its conduct or useful in its efficient operation. * * *"

and further at page 113:

> "The engineer's statement which was held inadmissible in the case falls into quite a different category. It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. *It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls.*" (Emphasis supplied.)

Moreover, in assuming that the opinion of this Court in *Palmer* v. *Hoffman* was based upon the presence of a "motive to misrepresent", as its own opinion had been, the court below ignored the fact that this Court had placed its emphasis not upon the presence of such a motive, but instead upon the fact that accident reports do not come within the literal terms of the statute, since they are not "entries made systematically or as a matter of routine" or "routine reflections of the day to day operations of the business". 318 U. S. 109, at p. 114.

The Second Circuit Court's interpretation of this Court's opinion in *Palmer* v. *Hoffman* is squarely opposed to that placed upon it by the Court of Appeals for the District of Columbia in *New York Life Ins. Co.* v. *Taylor*, 147

F. 2d 297, when it stated (we submit, correctly), that (p. 301):

> "Cross-examination is unimportant in a case of systematic routine entries made by a large organization where skill of observation or judgment is not a factor. We believe that Palmer v. Hoffman restricts the application of the Federal Shop Book Rule statute to that type of business entries."

and again, on rehearing (147 F. 2d 297, at p. 306):

> "In other words, it is not the absence of a motive to misrepresent which is the basis of the Shop Book exception to the hearsay rule. Purely clerical entries come within the rule regardless of the fact that the party making them has an interest in what they may be used to prove. * * *
>
> * * * * * * * * *
>
> It is true that in Palmer v. Hoffman, supra, the Supreme Court spoke of the opportunity for manufacturing evidence which would exist if an engineer's statement, made in the course of a company investigation of an accident, was held admissible in a suit based on that accident. But this was not the sole ground for the decision. The Court's rule as to admissibility is clearly based upon the subject matter of the entries, their routine character, and their similarity to payrolls and the like."

Thus, the court below, in adhering to its own opinion in the *Palmer* case, has grafted on to this Court's decision, as controlling, a limiting consideration which we submit is not present, and has interpreted that decision in a manner contrary to the interpretation of at least one other Circuit. It is respectfully submitted that this Court should review and clarify the rationale of its opinion in *Palmer* v. *Hoffman* so that its value as a precedent may not be vitiated by conflicting decisions in the lower courts.

2. Moreover, the holding of the court below that the fact that the excluded reports contained opinions and conclusions does not remove them from the class of "business entries" is squarely in conflict with decisions in the Courts of Appeal for the District of Columbia and for the Fifth Circuit.

New York Life Ins. Co. v. *Taylor* (App. D. C.), 147 F. 2d 297;
England v. *United States* (5 Cir.), 147 F. 2d 466.

In the case at bar, the Second Circuit Court cited its own decisions in *Hunter* v. *Derby Foods, Inc.*, 110 F. 2d 970, *Reed* v. *Order of United Commercial Travelers of America*, 123 F. 2d 252, and *Buckminster's Estate* v. *Commissioner of Internal Revenue*, 147 F. 2d 331, relating to opinions contained in hospital records and death certificates and stated:

> "We hold that inferences drawn by boards such as those set up in the present case were of the same general character, and were admissible [under the statute]" (R. 648).

This precise point was considered by the Court of Appeals for the District of Columbia in the *Taylor* case cited above. That Court, after hearing argument and reargument, came to a conclusion diametrically opposed to that reached by the Second Circuit Court here, holding that

> "* * * where the accuracy of the entries depends on opinion, conjecture, or judgment in selecting the particular entries from a larger mass of data which some other observer might consider equally relevant, the entries are not within the Rule regardless of motive." 147 F. 2d 297 at p. 306.

The Second Circuit Court criticized and expressly refused to follow this holding in *Buckminster's Estate* v. *Commissioner of Internal Revenue*, 147 F. 2d 331, 334, a case which it cites in support of its opinion in the case at bar.

The irreconcilable nature of the conflict is demonstrated by the fact that on a second appeal in the *Taylor* case, 158 F. 2d 328, decided after the decision in *Buckminster's Estate,* the District of Columbia Court of Appeals reaffirmed its earlier opinion, again pointing out (at page 329) that the inclusion of expressions of opinion "about which equally competent men could differ" removed the document in question from the class of business entries contemplated by the statute.

The Court of Appeals for the Fifth Circuit has also construed the statute as excluding matters of opinion and conclusion in the case of *England* v. *United States,* 174 F. 2d 466, 469.

Thus there exists a sharp conflict between the Circuits on this specific point, as to which this Court has not spoken. It is respectfully submitted that in view of the conflict and the confusion which now exists, this Court should give this matter its consideration.

3. Still another conflict with the decisions of other Circuits is involved in the holding that the excluded reports should have been admitted as "admissions" of the defendant corporation, even though it appeared that the reports had been made not as company reports to outsiders, but as intra-company reports not shown to have been adopted by the company itself for transmission to outsiders.

In its ruling on this point, the court below assumed its own conclusion in stating that it was not necessary for the board of directors to adopt the reports to constitute them reports

> " * * * for whose truth it vouched or upon which it wanted action taken. It would seem idle to question the authority of the general manager to inaugurate the investigation and to set up suitable boards of experts to arrive at what the company considered the truth * * * " (R. 645).

There is no issue here as to the authority of the general manager to inaugurate the investigation, nor to set up boards of experts. There is, on the other hand, a sharp issue as to whether the corporation "adopted" these reports or, in the words of the court below, vouched for their truth. The record is completely barren of anything from which even an inference of such "vouching" can be drawn. True, some action may have been taken by the company on the basis of the reports (although it does not appear clearly in the record), but this is no more relevant to the issue here than is any post-accident remedial action relevant to the issue of fault, and certainly is no affirmation by the company to outsiders that the boards' conclusions were to be taken as truth and acted upon by them as such.

Thus we have employees' intra-company reports held by the court below to be admissions of the company with no showing that they had been in any way adopted by the company.

This holding is in conflict with the opinion of the Seventh Circuit Court in the case of *Lever Bros. Co.* v. *Atlas Assur. Co.*, 131 F. 2d 770, which upheld the action of the trial court in excluding a report of "unnamed engineers of plaintiff", which had been offered as an admission.

> "* * * It had been prepared long after the accident, and purported to be the presentation of facts and conclusions of certain of plaintiff's agents whose acts and conclusions were never shown to have been adopted or approved by the plaintiff, and were not part of the res gestae. Such narrative statements were not binding upon the plaintiff [citing cases]." 131 F. 2d 770 at pp. 776, 777.

Decisions as to what constitutes "adoption" by a corporation of an agent's report to other corporation employees are few and far between. It is respectfully submitted that the clear implication of the decision below

is that authority of an agent to report to a principal is *ipso facto* authority to bind the principal by that report—a holding which is contrary to the holding of the Seventh Circuit and, we submit, to the dictates of justice.

4. Finally, the holding of the court below that,

> "Inconsistent opinions as well as inconsistent statements of underlying facts may qualify as admissions * * *" (R. 645),

is squarely in conflict not only with decisions in other Circuits, but with less recent decisions of this Court.

No point is made that this statement is incorrect as applied to the opinions of a *principal.* We submit, however, that it is clearly erroneous as applied to the opinions of an *agent.*

In the case of *Insurance Company* v. *Malone,* 21 Wall. 152, this Court laid down as a flat rule (p. 157):

> "The opinion of an agent, based upon past occurrences, is never to be received as an admission of his principals; and this is doubly true when the agent was not a party to those occurrences. We have so recently discussed this subject in *Packet Company* v. *Clough* [20 Wall. 528], that it is needless to say more."

The "agent" in that case was described by the Court as "the general travelling agent and supervisor of the defendants in the Southern States". The opinion which he had expressed to his principal (the insurance company) was that it should pay a claim under a policy. This case, although cited to the court below, is not distinguished or even discussed in the opinion of that court.

The holding of the court below that the corporation here "did not necessarily have to act through its board of directors to authorize a final report * * *" (R. 645), if it is taken to mean that the corporation need not act through

its board of directors to adopt the report as its own, is also in conflict with the holding of the Ninth Circuit Court of Appeals in *Lorber* v. *Vista Irrigation District,* 127 F. 2d 628. There the "Secretary-Manager" of the District reported his opinions on a certain question to the board of directors, in writing. His report was offered as an admission of the District, and excluded by the trial court in the absence of a showing that the report had been read and discussed at a board meeting. The Court of Appeals affirmed, saying (127 F. 2d 628, at p. 636):

> "As stated by the trial judge at the time the letter was first presented for introduction in evidence: 'You can't say that it is an admission by the district, because it is nothing more than a communication from the manager of the district to the board of the district. In other words, if the district is represented by its board, then it isn't the board that makes this statement, but one of the officers who is communicating to the board his views. It is nothing more than his opinion, and I don't see that it constitutes an admission by the district.'
>
> We find no error here."

5. It is respectfully submitted that the demonstrated conflict and confusion which exists at present between the Circuit Courts on the question of the admissibility of such reports as here involved, either as admissions or as business entries, is enough to require this Court to clarify the situation for the benefit of the Circuit Courts, and more especially for the guidance of the trial courts in their rulings on questions of evidence presented. That this is not an insignificant question of evidentiary law which may be left to the discretion of the courts below is evident from the fact that accident investigations are conducted by almost every major airline in the United States in the interests of safety and of the welfare of the travelling public. With the

increase in the amount of air travel and the consequent increase in the number of accidents of one sort or another, it follows that the amount of litigation arising out of these accidents increases in proportion. If the opinion of the Second Circuit Court in this case is affirmed and the reports of such company investigations are held admissible in suits of this nature, the purposes of these investigations will be defeated. Instead of being directed at uncovering, without the fear of thereby admitting liability, every major or minor discrepancy which *might* have contributed to the accident, they will necessarily be severely restricted. If the airlines are to be bound by any action of a remedial nature which they may undertake, the scope of that action will be reduced to what is unquestionably and imperatively demanded. The airlines will no longer be able to act, as they should be able to act, upon the mere suspicion or intimation of fault. They will as a practical matter be required either to overlook such suspicions, no matter how well founded they may seem, or take the risk of assuming a huge liability upon the basis of such suspicions.

In any event it is respectfully submitted that the airlines should have an authoritative ruling of this Court as to the extent to which they are bound by the findings of their investigation boards in such suits as these.

Conclusion.

For the foregoing reasons, your petitioner prays that a writ of certiorari be granted.

Dated: New York, N. Y., May 14, 1951.

Respectfully submitted,

TRANSCONTINENTAL & WESTERN AIR, INC.,
Petitioner,

By WILLIAM J. JUNKERMAN,
Counsel for Petitioner.

Appendix A.

28 U. S. C. § 1732

"§ 1732. Record made in regular course of business.

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect it weight, but such circumstances shall not affect its admissibility.

The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind. June 25, 1948, c. 646, 62 Stat. 945."

Appendix B.

Opinion of Judge CLANCY during the trial of *Weil* v. *T. W. A.* (Civil No. 43-307, U. S. D. C., S. D. N. Y.)

> "All of these reports purport to be presentations of facts and the conclusions of certain persons in the defendant's employ, made to the company after the accident, and not shown ever to have been adopted or approved by the defendant. As such they are inadmissible.
>
> (*Lever Bros. Company* v. *Atlas Insurance Company,* 131 Fed. (2d) at 770;)
>
> (*Solow* v. *General Motors Truck Company,* 64 Fed. (2d) 105.)

We have been given to understand that these reports were all submitted to the CAB in the course of that Board's investigation. This does not constitute any explicit or implied adoption or approval by the defendant of the contents of the reports. They were submitted for what they were, that is, reports to the defendant, not by the defendant.

Secondly, the separate findings or certain limited findings are submitted or to be submitted as admissions. To take them or any of them out of their context, which consists of the oral statements on which they are based, and the form of a report thereon, is to change their whole nature. In their context it is undeniably obvious that they are either conclusions, which cannot be admissions, or summary statements of fact composed by their authors and representing so much of what the authors heard a witness or witnesses say, as they accepted. Unqualified statements of fact have been submitted as admissions, though later they have been made to appear to be hearsay reports, as they were in the Appellate Division authorities that have been submitted by the plaintiff. Their apparent character carried them past objection. A statement that on its face is a secondhand repetition of hearsay, cannot be deemed an admission.

(*Reed* v. *McCord,* 160 N. Y. at 341.)

I want to add that I personally think that the formulation of a finding of fact by an employee cannot be deemed the work of an agent in any sense, unless the employee is directed to make a specific finding. It is contrary to the very nature of a finding of fact made with the intention to convey it to the employer. That has to be an independent operation."

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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Attorney for Respondent,
575 Madison Avenue,
New York 22, New York.

Dated: May 21, 1951.

THE COURT PRESS, N. Y. C.

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Opinion Below.

The opinion of the Court of Appeals for the Second Circuit (R. 632-650) is reported in 187 F. (2d) 122.

Jurisdiction.

The judgment of the Circuit Court of Appeals is dated February 15, 1951 (R. 651). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

Statement.

This is an action brought by Respondent (plaintiff below) for damages for wrongful death. Plaintiff's husband was killed on December 28, 1946 when one of Petitioner's airplanes on which he was a passenger crashed near Shannon Airport, Eire.

Immediately after the accident, in accordance with its established procedures Petitioner (defendant below) undertook an investigation to determine the causes of the accident. As indicated in the opinion of the Court of Appeals, the investigation was most elaborate and thorough (R. 638-641). It was conducted by specially constituted Boards, consisting of important supervisory employees of defendant. After months of investigation, these Boards made their final report—the authoritative statement of the Company as to what caused the accident. The final report —the International Division Accident Investigation Board Report—was signed by defendant's Superintendent of Flight Operations, its Director of Engineering and Maintenance, its Operations Manager—Atlantic Region, its Supervisor of Flying—Atlantic Region and its Supervisor of Meteorology (Pltff.'s Exhs. 9 and 12, R. 173, 496, 534).

That final report found that the accident was caused by a reversal of certain hose lines with consequent malfunctioning of the altimeter and by a deliberate failure on the part of responsible employees of the Company to make certain tests which would have disclosed the reversal, although at least one of the employees signed the form indicating that he had performed the test (R. 531-533, 612-613). At the trial

plaintiff contended that the cause of the accident was exactly what the Company had found. Defendant, ignoring the findings of the final report, contended that the accident was due to pilot error and that in fact the hose lines were not reversed at all.

On this state of facts, involving highly technical questions, with a lay plaintiff suing an airline which presumably had considerably more expert knowledge than did the plaintiff, it would obviously have been of the greatest materiality for the jury to know that the airline defendant, after the most exhaustive investigation made by its skilled experts, had finally found that the accident had happened exactly as plaintiff contended. These findings and the report of the investigations constituted the reports which plaintiff sought to offer in evidence and the District Court excluded. With these reports kept from the jury, defendant was able to argue blandly that there was just nothing to plaintiff's case and that the lay plaintiff's whole theory of how the accident had happened was just lawyer talk. Moreover, defendant never even had to explain how it happened that, until the exigencies of litigation intervened, defendant's own experts had found the accident to have happened just as plaintiff contended.

The reports prepared under the circumstances and auspices to which we have referred—and which the Court of Appeals considered in detail—would have been perhaps the most reliable and informative evidence available. Exclusion of these reports, *on the objection of the defendant whose reports they were,* permitted the defendant to cripple the Court and the jury in their search for the true facts.

The Court of Appeals reversed because it held that these particular reports prepared under the circumstances of this case were admissible in accordance with well-established principles of the law of evidence. The unanimous opinion of the Court of Appeals, written by Judge A. N. Hand, contains a full exposition of the reasons for its decision with abundant citation of authorities. We think that for the purposes of this application, it is unnecessary for us to say any more about the merits than is contained in that opinion. We shall devote this brief to the question whether a writ of certiorari should be granted.

Summary of Argument.

No ground for granting a writ of certiorari exists.

The writ will not be granted to review a simple evidence question.

The court below held that the reports in question were admissible as admissions against interest as a matter of New York law and also as business entries under the Federal Business Entry Statute, 28 U. S. C., § 1732. Since this Court will not review questions of State evidence law, there is no basis for granting the writ of certiorari.

Petitioner does not suggest any reason why the court below erred in ruling that it was error for the District Court to have excluded the Sigman letter.

ARGUMENT.

I. Petitioner seeks review of a simple evidence question.

In this case Petitioner asks this Court to review a simple evidence question—whether the trial court should or should not have admitted particular evidence. The error of which Petitioner complains is that the Court of Appeals ruled that the evidence should have been admitted. Petitioner's complaint is that this evidence should have been kept from the jury.

No novel, important or general question of the law of evidence is involved in this case. Substantially all that is involved is whether on the particular facts of this case, particular pieces of evidence should have been admitted. The Court of Appeals applying well established principles of the rules of evidence held that the reports in question should have been admitted. That cases cited by Petitioner in its brief, applying the same principles to other states of fact, held other evidence to be inadmissible, does not establish a conflict of circuits.

II. Reports admissible on two independent grounds.

The Court of Appeals held these reports admissible on two independent grounds:

(a) as an admission against interest by the defendant, the reports being offered in evidence by the plaintiff, both as a matter of State and Federal law, and

(b) as business entries under the Federal Business Entry Statute, 28 U. S. C., § 1732.

If the evidence was admissible on either ground, the other ground becomes unimportant.

1. Petitioner makes its chief argument for certiorari on the interpretation and application by the court below of the decision of this Court in *Palmer* v. *Hoffman,* 318 U. S. 109. But *Palmer* v. *Hoffman* has nothing to do with the admissibility of the reports as admissions. That decision involved only the question of the admissibility of certain reports under the Federal Business Entry Statute when offered in evidence by the defendant whose employee had made the reports. Thus, if as the Court of Appeals decided, the reports are admissible as admissions by the defendant, the decision of this Court must be the same regardless of the Court of Appeals' interpretation of *Palmer* v. *Hoffman, supra.*

2. Considering the admissibility of these reports as admissions of a party, no new principles of law were involved. The Court simply held that these documents were admissions made by the agent of a party acting within the scope of his authority.

3. If admissible under either New York or Federal Rules, the evidence should of course have been admitted. Rule 43 (a) of the Federal Rules of Civil Procedure provides:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence

applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs * * *."

The Court of Appeals held that, considered as an admission, the evidence was admissible both under Federal and State rules of evidence, citing the leading New York case of *Reed* v. *McCord*, 160 N. Y. 330 (R. 643). Thus, in order for this Court to review the admissibility of these reports, it would have to review the decision of the court below sitting in New York, on the application of a New York rule of evidence.

4. Petitioner suggests that the holding of the Court of Appeals in the case at bar would mean that all reports by subordinate employees to their superiors would be admissible against the employer, notwithstanding the fact that the employer may have rejected or disagreed with the facts stated in the subordinate's report. But there is no such question in this case. In this case the court below has specifically found that these reports were not merely reports from subordinates, or expressions of suspicion, but were the Company's final and definitive statement; "that this report was intended by the parties to be final and was final * * * it was to be the final determination of causes and responsibility" (R. 641).

5. Petitioner also suggests that there is something novel about admissibility of these reports because they contain "conclusions" and "opinions". It is well established under New York law that an admission by a party is admissible notwithstanding the fact that it contains "conclusions" and "opinions". *Reed*

v. *McCord*, 160 N. Y. 330; *Gangi* v. *Fraudus*, 227 N. Y. 452, 457; *Davison* v. *Long Island Home*, 243 App. Div. 791.

And, incidentally, here as in the court below, although Petitioner talks about "conclusions" and "opinions" it nowhere points to any specific part of the International Division report as a "conclusion" or an "opinion". The report in its most important aspect is a simple statement of what happened, that malfunctioning in the plane caused the accident, and how that malfunctioning occurred and was not detected. All these are obviously statements of fact—true not facts within the personal knowledge of the person making the report, but facts nonetheless. Under the New York law of evidence, an admission of a party need not be based upon personal knowledge. *Reed* v. *McCord, supra.*

6. Petitioner suggests that on the admission point there is a conflict with other cases. But analysis of the other cases reveals again that there is no conflict—certainly no conflict as to New York law—and that the other cases merely involved other facts, *e. g.*, primarily statements made by subordinates without authority.

Thus *Lever Bros. Co.* v. *Atlas Assurance Co.*, 131 F. (2d) 770, is not authority for the exclusion of the reports here involved. There the court held that a document prepared by "unnamed engineers" of plaintiff and an independent engineering firm was not admissible against plaintiff as an admission. The court held that to admit the document would violate a non-waiver agreement that had been made between the parties. There was no showing that the un-

named authors of the document were acting within the scope of any authority granted to them by plaintiff. The document was not made by specially authorized "Boards" as were the reports in the case at bar.

Nor is the decision in *Lorber* v. *Vista Irrigation District,* 127 F. (2d) 628, in conflict with the holding below. The *Lorber* case involved a proceeding by an irrigation district for the composition of debts under the provisions of the Federal Bankruptcy Act. Plaintiffs, dissenting bondholders, raised the issue that the plan of composition was not offered and accepted in good faith by the consenting bondholders. In support of their contention, and as an admission of the District, plaintiffs offered an unsolicited letter written to the Board of Directors of the District from their Secretary-Manager which advised against going through bankruptcy. The Circuit Court held that the exclusion of this letter was not error on two grounds:

First, the proposed evidence was not material to the issue of the Directors' good faith "As we view it, the fact that the Secretary-Manager of the District proposed to the Directors that they not go through bankruptcy would not be any proof at all that the Directors in disregarding the suggestion did so in bad faith." 127 F. (2d) 628, at p. 635.

Second. There was no evidence that the letter was ever received and considered by the Directors of the District.

This is hardly comparable to the case at bar where the various investigations were conducted by specially

authorized Boards whose precise function was to investigate and issue reports.

7. The question of the application of this Court's decision in *Palmer* v. *Hoffman,* 318 U. S. 109, with respect to the admissibility of these reports under the Federal Business Entry Statute is sufficiently discussed in the opinion of the court below.

Once again, however, petitioner has found conflict with other circuits on the basis of difference in result. The court below held the reports in the case at bar were admissible under the Federal Business Entry Statute, while the Court of Appeals for the District of Columbia held other evidence inadmissible on the facts presented to it in *New York Life Ins. Co.* v. *Taylor,* 147 F. (2d) 297. But while there are differences in reasoning and emphasis between the opinions, both courts held that the purpose of the statute was to facilitate the admission of records which are "trustworthy" and both courts adopted the standard of this Court in *Palmer* v. *Hoffman, supra,* that the test of admissibility must be " 'the character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation'." 147 F. (2d) 297, at pp. 300-301, 303 (R. 644).

Faced with the offer by the defendant insurance company to prove suicide via hospital records to the effect that the decedent's state of mind was one which indicated the probability of suicide, the Court in the *Taylor* case, *supra,* held that this evidence did not meet the standards of trustworthiness prescribed by this Court in *Palmer* v. *Hoffman, supra.* In the case at bar the Court of Appeals decided that those stand-

ards had been met with respect to an offer by plaintiff to prove the cause of the accident by reports prepared by defendant's experts immediately following the crash and before the commencement of litigation. This difference in result does not establish conflict in the circuits with respect to the interpretation of this Court's opinion in *Palmer* v. *Hoffman, supra.*

III. The Sigman letter.

The admissibility of these reports was not the only error that the Court of Appeals found. The Court of Appeals also found that the District Court erred in excluding as irrelevant the letter of Captain Sigman (R. 635-637). This letter bore very materially on the effect of the reversal of the hose lines on the altimeter and thus supported plaintiff's view as to the cause of the accident. Petitioner in its brief in this Court does not attempt to defend the exclusion of this letter by the District Court, nor suggest any reason why the Court of Appeals erred in ruling that it was error to exclude the letter. The Court of Appeals did not find it necessary to decide whether the error was so prejudicial as in itself to warrant reversal (R. 637), although it said that letter dealt with "a matter of very considerable importance" (R. 637)—nothing less than the causal relationship between the misconduct complained of and the accident. Petitioner simply ignores the whole matter of the error found by the Court of Appeals in the exclusion of the Sigman letter.

CONCLUSION.

The petition for writ of certiorari should be denied.

Dated: May 21, 1951.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1950

No. 739

TRANSCONTINENTAL & WESTERN AIR, INC.,
Petitioner,

v.

CARLA PEKELIS, individually and as Administratrix of the goods, credits and chattels which were of Alexander H. Pekelis, deceased,
Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Respondent's brief in opposition to the petition for certiorari contains so many unsupported assumptions and implications going to the very issues here involved that it is necessary for your petitioner to file this brief in reply.

1. Initially respondent misstates the question presented by this petition by assuming as established fact the answer to the most important single phase of that question. Throughout the brief respondent assumes that the reports were "the authoritative statement *of the Company*" (p. 2), and states that " * * * *the airline defendant* * * * had finally found that the accident had happened exactly as plaintiff contended" (p. 3). She complains that the reports had

been excluded "on the objection of the defendant *whose reports they were*" (p. 3). She also states, on page 7 of the brief, that the Second Circuit Court had "specifically found" that "these reports * * * were *the Company's* final and definitive statement".

Nothing could be further from the true facts appearing both in the record of the trial and in the opinion of the Court below. Nothing in the case is as clear as the fact that these reports, as appears in the opinion of the Second Circuit Court (R. 641), were *not* in fact Company reports, but reports of company employees submitted to the General Manager and never issued by the Company itself. The main issue is whether such reports were, as a matter of law, reports "of the Company" in the sense that the Company was bound by their contents (R. 641). Respondent, by assuming at the outset that the reports were in fact "the authoritative statement of the Company", ignores the most important issue in the case.

Further illustrating respondent's misinterpretation of the question are the statements appearing on page 5 of the brief where it is said that

> "Petitioner's complaint is that this evidence should have been kept from the jury"

and that

> "Substantially all that is involved is whether on the particular facts of this case, particular pieces of evidence should have been admitted".

Obviously that is not petitioner's contention; what petitioner is contending is that these reports were not evidence.

2. Respondent assumes (p. 5) that this Court will not review "a simple evidence question". It is sufficient to cite

this Court's opinions in *Palmer v. Hoffman,* 318 U. S. 109, and *Insurance Company* v. *Malone,* 21 Wall. 152 (both cited and discussed in the petition) to dispose of this contention. It should also be pointed out that the construction of a Federal Statute, as well as a conflict between the Circuits and with decisions of this Court itself, is also involved.

3. Respondent states (p. 6) that

> "* * * no new principles of law were involved. The [Second Circuit] Court held that these documents were admissions made by the agent of a party acting within the scope of his authority."

Your petitioner has no quarrel with this statement of the holding of the court below, as far as it goes. The decision of the court below, however, was based upon the further holding that such admissions of an agent are binding on his principal. That this holding did involve a "new principle of law" is quite clear when it is contrasted with the statement of this Court in *Insurance Company* v. *Malone,* 21 Wall. 152, 157, that:

> "The opinion of an agent, based upon past occurrences, is never to be received as an admission of his principals."

4. Respondent twice implies (p. 7) that the decision of the court below may be upheld solely on the authority of the decision of the New York Court of Appeals in *Reed* v. *McCord,* 160 N. Y. 330. Quite apart from the fact that that case was cited by Judge CLANCY as authority for the opposite conclusion (Petition, Appendix B, p. 16), it involves the statement of a principal, not of an employee, and is therefore no authority for the admission of the reports involved here. The case was cited by the court below (erroneously, we submit, although the correctness of the citation is not an

issue on this specific point) only for the proposition that the inclusion of opinion will not render the admission of *a principal* inadmissible (R. 642, 643).

5. Respondent implies (p. 8) that the excluded International Division report contains no opinions or conclusions. The next sentence effectively disposes of this argument by stating a conclusion contained in the report: "*that malfunctioning in the plane caused the accident* * * *."

6. On pages 8-10 of her brief, respondent purports to distinguish the facts in the *Lever Bros.* and *Lorber* cases from those in the present case and to show that there is no conflict between them. She does not and cannot dispute the fact that the holdings of the cases, as quoted on pages 11 and 13 of the petition, are squarely in conflict with the principles of law set out by the Second Circuit Court here. Moreover, respondent does not and cannot deny that the opinion below is diametrically opposed to the decision of this Court in *Insurance Co.* v. *Malone,* 21 Wall. 152, cited on page 12 of the petition.

7. Respondent implies (p. 10) that there is no conflict between the decision of the court below and that of the Court of Appeals for the District of Columbia in *New York Life Ins. Co.* v. *Taylor,* 147 F. (2d) 297. She overlooks the fact that in *Buckminster's Estate* v. *Commissioner,* 147 F. (2d) 331, a case cited in the opinion of the court below as applicable to the facts here (R. 645), the existence of a conflict was expressly recognized by the Second Circuit Court:

> "We do not agree with the way in which Hoffman v. Palmer was interpreted in the Taylor case * * *. Since § 695 is a federal statute of general application, its construction by the Court of Appeals of the District of Columbia has no peculiar sanctity, and,

> *as we think that Court's construction was in error,* we hold that it was not binding on the Tax Court." 147 F. (2d) at pages 334, 335. (Emphasis supplied.)

8. Respondent asserts at page 11 that

> "Petitioner simply ignores the whole matter of the error found by the Court of Appeals in the exclusion of the Sigman letter."

Since the court below specifically refused to decide whether this exclusion constituted reversible error (R. 637), and since, in any event, the correctness of the decision of the court below is not yet before this Court, this point is not well taken. It should, however, be pointed out that the holding with reference to the alleged copy of the Sigman letter, which Sigman was unable to identify when he was confronted with it during the trial, is assigned as error (Petition, p. 5). If the writ prayed for is granted, it will be argued that this holding was in error.

9. Finally, although petitioner does not at this time argue the merits of this question, it is necessary to point out that, in the statement of the case contained in respondent's brief, the exclusion of the reports in question is presented as if they were the sole evidence available to plaintiff and the jury. In so doing, respondent completely disregards the evidence which the jury had before it during the lengthy trial of this action, which included the testimony, either by deposition or directly, of several employees of the defendant who were members of the reporting boards and who signed these reports. Further, plaintiff had copies of the reports and disclosure of their contents in advance of the trial. Under the circumstances, if any such witness had departed from statements which he had made in any of these reports, plaintiff could have

used the reports to impeach the witness. In view of this, it is absurd to state as respondent does in her brief that

> "exclusion of these reports * * * permitted the defendant to cripple the court and jury in the search for true facts" (p. 3).

Also ignored by respondent is the fact that the jury with all this evidence before it found wilful misconduct had not been proved.

Respectfully submitted,

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